SUPREME COURT, U. S.

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JOHN F. DAVIS, CL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 91

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1278

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Respondent contends that the Florida District Court of Appeal was not the highest state court in which a decision could be had herein because the Florida Supreme Court may review by certiorari an appellate decision "in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law" (Fla. App. Rule #4. 5c [6]).

Respondent cities no such possible conflicting decision. There is no Florida decision of which petitioners are aware involving a "direct conflict. . . on the same point of law," i. e., no Florida decision holding statues not obscene (see Question 1, Petition pp. 20-25), no Florida decision holding the Miami Ordinance or similar law unconstitutional on its face (see Question 2, Petition pp. 25-27), and no Florida decision rejecting seizure and confiscation of statues without a warrant as in the case at bar (see Question 3, Petition pp. 27-30).

Respondent's totally unsubstantiated allegation that the question of the Florida Supreme Court's possible conflict jurisdiction herein "is, however, left open" is incorrect. The Florida Constitution and Florida Appellate Rules do not contemplate a useless petition for "conflict certiorari" to be filed in the Florida Supreme Court with no citation of a case upon which such certiorari could possibly be based.

Petitioner has exhausted his Florida appellate and certiorari remedies as set forth in the Petition (pp. 2-3) with pertinent supporting citations.

TESTIMONY AT TRIAL

Contrary to respondent's assertion, petitioner's "Summary of Evidence" (Petition pp. 6-20) does not contain inaccurate page citations to the Certified Transcript which accompanied the Petition for Certiorari herein. Petitioner sent respondent the required notice of docketing with a copy of the Index to the (Certified) Transcript including proper pagination in this Court. Respondent has nevertheless employed pagination of the record as it was on appeal to the Florida Circuit Court.

Respondent's "Summary of Testimony" contains several points which require comment (although petitioner does not seek to repeat its detailed Summary in the Petition). First, Sergeant Quinn's opinion as to what each statue represented in terms of sexual practices was based on invisible

genital organs. (Tr. 64-69, cf. 86). Second, Officer Matta's determination of obscenity allegedly based on "the attitude of the people," as stated by respondent was actually based on what he designated "giggling and laughing" of four twelve to eighteen year old children in the area (Tr. 82-83). Third, Officer Matta's "opinion" that the statues "appear nude" was based on no marking "one way or the other" to show whether or not clothing was being worn (Tr. 91).

Respondent's "summary" of the testimony of Professor Painter and Dr. Kapchan (see e. g. Tr. 139-140, 155-156) reveals a complete ignorance of existing advertising methods and corresponding lack of comprehension concerning this portion of expert evidence on behalf of petitioner. The advent and effect of motivational research and Freudian advertising has been discussed in numerous books including **"The Hidden Persuaders"** by Vance Packard (Pocket Book Cardinal ed., 1958, see especially pp. 70-91), **"Madison Avenue, USA"** by Martin Mayer (Pocket Book Cardinal Giant, 1959) and **"The Insolent Chariots"** by John Keats (Crest Reprint, 1959). The last named book discusses automobiles as follows:

> "Sex, of course, never need wait to be asked to raise its lovely head, and identification of the automobile as a sexual symbol was an instantaneous reflex action for America. . .
> (p. 52)

> "Detroit was certainly not blind to any of this, and responded not only by putting a dream girl in every advertisement of a dreamboat, but also by building deliberate sexual symbols into automobile designs in the expectation that the car's outward shape would precisely represent the shape of the customer's sexual pecularity. It is not sheer accident, for example, that most manufacturers put penial geegaws on the hoods of their cars,

> or that Cadillac's stylists speak of the 'bosoms' on their bumpers, or that Buick came up with its famous ring peirced by a flying phallus, or that Madison Avenue was quick to applaud the Edsel for its 'vaginal look', or that so many Detroit stylists lavish so much attention on the rear ends of automobiles..."
> (p. 53)

The point is that blatantly suggestive commercial practices[1] emphasizing the potential sexual symbolism of any line and any circle render "highly symbolic and abstract... works of art of considerable complexity and depth" unlikely to appeal to prurient interest (Tr. 157).

When Dr. Kapchan admitted candidly that the statues "could" influence the sex urge of not only adults but children, trial counsel for the City of Miami stated, "[i]n other words,... [they are] prurient" (Tr. 165), and thus equated sex with pornography or obscenity. Dr. Kapchan, noting the scientific fact that "sexual arousal" has been observed "in infants of two months" (Tr. 164), then explained his obvious conclusion that the statues could influence sexual urges in "healthy channels as well as abnormal... [ones depending] on the total concept of the individual" (Tr. 165-166).

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[1]Verbal advertising is similarly suggestive. A generation ago "so round, so firm, so fully packed, so free and easy on the draw" characterized one brand of cigarettes. A recent TV jingle about another brand cautions that "it's not how long you make it, it's how you make it long." No implication of art is found in the verse or jingle.

UNCONSTITUTIONAL APPLICATION OF ORDINANCE RE OBSCENITY (Question 1)

Respondent takes the position that the statues are obcene because (1) they portray unnnatural sex acts forbidden by the criminal law, thus affronting contemporary community standards, and (2) none of this Court's decisions upon which petitioner relies deals with statues as distinguished from books and movies, leastwise with statues "crudely constructed in fiberglass."

Petitioner denies that the statues represent perverted sexual acts except insofar as the eye of the beholder, particularly if "trained" by modern advertising methods, so endows the structural designs in space. The beholder seeking "the emotion of love" or the promotion of "normal love," as intended by the sculptor (Tr. 183), as well as the beholder with no "preconceived idea" (Tr. 117-118) may "see" objects of a religious, acrobatic, entomological or other nature, objects unrelated to the criminal law.[2]

While it is true that petitioner has been unable to find any relevant decision of this Court dealing per se with statues, the rationale of the cases cited in the Petition would seem to apply equally to all forms of artistic expression. The case at bar has potential significance beyond the particular statues involved in that the inclusion of sculpture within the First Amendment has apparently occurred only through dicta in Mr. Justice Douglas' dissenting opinion in **Poe v. Ullman**, 376 U. S. 497, 514, 81 S. Ct. 1752, 1761, 6 L. Ed. 2d 989, 1002. In any event, respondent's conclusion that the statues in question are "crudely constructed"[3]

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[2]Representation of an act violating criminal law does not, of course, automatically yield obscenity. Nudity is prohibited in many places where unclothed statues are quite permissible, i.e., museums and public parks. Note, also, artistic efforts dealing with violence.

[3]Respondent's reference to petitioner's "extremely crude application of fiberglass" in sincerely disputed by petitioner's counsel who are singularly unable, after repeated effort, to construct interesting castles in the sand.

appears valid in terms of the "smoothness" of automobile geegaws, a validity irrelevant to artistic merit. Nor is the statues' material, fiberglass, any indication of absence of social value. Art does not encompass only antiques. Similarly, whether or not the statues are "entirely successful" structurally has no bearing on the issue. Surely our Constitution does not protect only "good" art, whatever that may be.

Lastly, respondent contends that "[t]he public display of the statues was the culmination of the offense," relying on **Ginzburg v. United States,** 383 U. S. 463, 86 S. Ct. 492, 16 L. Ed. 2d 31. But what evidence of pandering, i.e., "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers," was presented in the case at bar? The sole advertisement concerning the 6 statues in petitioner's backyard, 50 or 75 feet from the highway, was a sign at either end stating "Art for Sale. $25 and up" (Tr. 44). The record reveals no law against selling art from one's backyard. The only "salacious cast" placed on the setting was done by respondent.

As in the very recent case of **Redrup v. New York,** _____U. S._____, _____S. Ct._____, 18 L. Ed. 2d 515, the case at bar does not involve a law aimed only at children, an unavoidable assault upon privacy, or evidence of pandering.

Petitioner urges, again as in the **Redrup** case, supra, that under all of the constitutional views presently taken by the Honorable Justices of this Court, the statues in the case at bar are "protected by the First and Fourteenth Amendments from governmental suppression. . ."

UNCONSTITUTIONALITY OF ORDINANCE RE OBSCENITY (Question 2)

Respondent defends the Miami Ordinance's sole and exclusive appeal-to-prurient-interest test as "actually more explicit than either the Federal Obscenity Statute or the

California Statute, both of which were upheld as constitutional by this Court in **Roth** [354 U. S. at 497, 77 S. Ct. at 1306, 1 L. Ed. 2d at 1503-1504, footnotes 1 and 2]."

The Miami Ordinance, § 10, is more explicit in the sense that neither the Federal nor the California statute referred to gives any test or definition of obscenity. The problem arises because the Miami Ordinance is explicitly wrong. Appeal-to-prurient-interest, standing alone, does not establish obscenity left unprotected by the Constitution. See Petition, pp. 25-27, and **Redrup v. New York,** .....U. S....., ...S. Ct....., 18 L. Ed. 2d 515.

UNCONSTITUTIONAL APPLICATION AND UNCONSTITUTIONALITY OF ORDINANCE RE SEIZURE OF STATUES (Question 3)

Respondent contends that the seizure and confiscation of the statues was constitutional as "it was incident to a lawful arrest, and all the statues were introduced into evidence." Petitioner submits that this Court's decisions requiring a warrant, notice and judicial adversary proceeding to determine the question of obscenity prior to seizure of the material (see Petition, pp. 27-30) are not rendered inapplicable by petitioner's arrest, also without a warrant, and particularly so when said arrest was based solely on the allegedly obscene statues. If the contrary be true, then the mere "judment of the police officer" held constitutionally insufficient to permit seizure of material as obscene in **Marcus v. Search Warrants of Property,** 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 would somehow meet the requirements of the First and Fourteenth Amendments so long as he also used his mere "judment" to arrest the owner/ possessor/ distributor/etc. of the material for such ownership/possession/distribution/etc.

As far as use of the statues for evidentiary purposes is concerned, it should be noted that petitioner never evinced

any intention to hide or destroy the statues. Such intention belongs to the respondent-City. Moreover, this Court itself has indicated that photographs of the statues are all that is necessary for adjudication of the issue of obscenity.[4]

In conclusion, petitioner takes the position that the seizure and confiscation provision of the Miami Ordinance as well as its application in the case at bar is unconstitutional in spite of the fact that the proceeding was criminal and in personam. See **Redrup v. New York,** .....U. S.....,.....S. Ct.....,, 18 L. Ed. 2d 515.

CONCLUSION

For the foregoing reasons as well as those set forth in petitioner's Petition for a Writ of Certiorari, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted, the decision below reversed and the six statues returned to petitioner.

Respectfully submitted,

By .....

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[4]Petitioner has abandoned the plan to forward 3 of the statues to this Court (see Petition, p. 6, footnote 2) pursuant to telephone calls from the Clerk of this Court informing counsel that one of the Honorable Justices of this Court requested that the statues not be sent to Washington, D. C.

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 22, 1967. I served copies of the foregoing Petitioner's Reply (to Response to Petition for a Writ of Certiorari) on Respondent by mailing a copy thereof in a duly addressed envelope to JACK R. RICE, JR., City Attorney, attention JOHN G. THOMAS and/or JOHN LLOYD, Assistant City Attorneys, 65 S. W. 1st Street, Miami, Florida 33130.

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